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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ARNOLD ANTHONY SILVA, Defendant and Appellant.	A118942 (Sonoma County Super. Ct. No. SCR-479830)

Arnold Anthony Silva (appellant) appeals from a judgment entered after a jury found him guilty of second degree murder, gross vehicular manslaughter while intoxicated, driving under the influence of alcohol causing bodily injury, and leaving the scene of an accident involving death. He contends the trial court erred in (1) admitting photographs of the decedent into evidence; (2) denying his motion to suppress his statements to the police; and (3) refusing to give instructions he requested regarding voluntary intoxication and implied malice. We reject the contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On February 6, 2007, an information was filed charging appellant with second degree murder (Pen. Code,[1] § 187, subd. (a), count 1); gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a), count 2); driving under the influence of alcohol causing bodily injury (Veh. Code, § 23153, subd. (a), count 3); and leaving the scene of

[1] All statutory references are to the Penal Code unless otherwise stated.

an accident involving death (Veh. Code, § 20001, subd. (a), count 4). The information alleged as to count 2 that appellant fled the scene of the crime (Veh. Code, § 20001, subd. (c)) and alleged as to counts 2 and 3 that appellant had suffered prior convictions for driving under the influence. The information also alleged that appellant had suffered a prior strike conviction.

At a jury trial, witnesses testified that appellant was a regular customer at the Wagon Wheel bar (the bar). Jodie Johnson testified that on January 9, 2006, she went to the bar at about 2 p.m. to have lunch and stayed for about 30 to 45 minutes. Appellant arrived at the bar while she was there. When Johnson returned to the bar after work at about 5:30 p.m., appellant was still there. She asked appellant to be her partner in a game of pool because she knew from experience that he was a "very good" pool player. However, that day, appellant played poorly and used the pool table "to basically balance himself while he was trying to shoot."[2] Johnson saw the bartender, "Kat," refuse to serve alcohol to appellant at some time between 6:30 p.m. and 7 p.m. Johnson testified that appellant appeared intoxicated when he left the bar. He was "[n]ot able to stand up, not able to hold his balance," and was "very loud." She told him not to drive and to get a ride home. Appellant looked down at her and said, "Do you know who I am?" Johnson told him, "I don't care who you are. My kids could be on the road. I don't want you driving." Appellant "peeled out" of the parking lot in his "big . . . Suburban type dark vehicle" without turning the headlights on.

David Allen testified he arrived at the bar at 4 p.m. and saw appellant there, in what appeared to be an intoxicated state. Allen testified that appellant was "loud, boisterous, [and] obnoxious," and was "moving all over the place," "[u]p and down the bar, just bouncing around."

Kathleen Joyce, a bartender at the bar, testified that when she began her work shift at 5 p.m. on January 9, 2006, appellant was already there. Appellant was not one of her

[2] Another witness, Luis Antonio Velez, Jr., testified that appellant was a poor pool player and that he regularly beat appellant. According to Velez, appellant played no worse than usual that day.

favorite customers because "he can be really obnoxious and in your face," making her job difficult at times. At some point during her shift, Joyce refused to serve appellant any more alcohol because he was being "antagonistic with other customers." He was "getting in people's faces," was "more boisterous and obnoxious than normal" and acting "a little bit crazy." Joyce testified that she served appellant three beers but took the third beer and poured half of it out. Later that evening, Joyce told appellant "not to be stupid and not to drive," and told him to get a ride from his friend, Luis Velez.

Velez testified that when he went to the bar between 4:30 and 5 p.m. on January 9, 2006, appellant was already there. He knew appellant because they both frequented the bar. By 6 or 6:30 p.m., appellant was "overboard" and more aggressive than usual. Velez saw appellant drink four to six beers and two to three shots of alcohol. After the bartender refused to give appellant any more alcohol between 6:30 and 7 p.m., appellant purchased whiskey shots, ostensibly for Velez and Allen, but drank them himself, then left the bar. Velez testified that when he saw appellant walk toward his Suburban, he told him "it wasn't good idea, that he was too drunk to drive, and that he was going to get a ticket or get arrested or kill somebody." Velez offered to give appellant a ride. Velez tried to take appellant's car keys and the two "struggled around the parking lot for like 15 or 20 minutes, pushing and shoving and things like that," until Velez gave up. Velez estimated that appellant left the parking lot between 6:30 p.m. and 7 p.m., driving at an unsafe speed.

City of Santa Rosa police officer Tom Peirsol testified that on January 9, 2006, he was working undercover in the property crimes narcotic unit. At about 7:55 p.m. that day, he was driving home in a city-issued pick-up truck after finishing his work shift. As he drove in the "No. 1 lane," or the "fast lane" at about 70 or 75 miles per hour, he saw in his rearview mirror that another car was approaching him in the same lane at a "much greater speed." Peirsol realized this car was not going to go around him, so he moved into the next lane to allow the car to pass. Peirsol watched the car swerve within its lane and "ke[pt] an eye on it" as he tried to determine whether the driver was driving under the influence and whether he needed to "call this in and see if I can get somebody to stop

it." The driver appeared to be a white male. After following the car for about a minute, Peirsol watched the car drift into the right lane and strike another car. The speeding vehicle, which was a Suburban, pushed both vehicles off onto the shoulder, up a little hill, and through a chain link fence. Peirsol pulled over and called 911. When he walked over to the Suburban, he saw that the driver's door was open and the left front tire was flat. He heard music playing loudly from the car stereo and smelled alcohol coming from inside the car. He believed the keys were still in the ignition. The driver of the Suburban was gone. He searched for a body, thinking it may have been thrown from the car, but did not find one. He saw a set of legs sticking out from underneath the second car. Someone tried, but was unable, to get a pulse in one of the ankles.

California Highway Patrol (CHP) officer Scott Zwetsloot testified he was dispatched to the accident scene at approximately 8:08 p.m. on January 9, 2006, and arrived approximately ten minutes later. When he arrived, fire trucks and an ambulance were already at the scene. He saw the victim lying on her back next to a Ford Escort (the Ford). He testified that a photograph of the victim lying next to the Ford accurately depicted what he observed at the scene, and the photograph was admitted into evidence. Zwetsloot testified he saw a beer can about ten feet from the Suburban. The lap portion of the Ford seat belt appeared to not have been used.

Ronald Dean Van Stone testified that at about 8 p.m. on January 9, 2006, appellant's wife, Mary Silva, dropped appellant off at Van Stone's house. Appellant's wife appeared to be upset with appellant, who "looked like he had been drinking." Appellant told Van Stone that he had just "wrecked his Suburban and he wanted to get out of there, so he . . . stopped by." Van Stone testified that appellant said "he thought he had blacked out" and did not "remember anything except going through a fence" and "w[aking] up after he crashed the car." Appellant was loud and repeated himself, his speech may have been slurred, and he had trouble with his balance. Appellant asked for a beer but Van Stone did not have any. Appellant mentioned he had left some beer and tequila in his car. Appellant talked about various ways in which "he could get out of it," including reporting his car as stolen. Appellant spent the night on Van Stone's couch.

Nanci Miller testified she was living with Van Stone on January 9, 2006. Her brother-in-law, Robert Wyatt, was visiting and was also at their house that day. Appellant unexpectedly showed up in the evening and said "he had just blacked out and went through the fence and rolled the Suburban." He said he left the car because "he was afraid of getting another DUI." Appellant was "staggering, somewhat belligerent" and "[s]lurring his words, just acting obnoxious." He talked about how he would "try to disguise his involvement in what happened to the Suburban," including saying he left it at the park and someone stole it and crashed it. Miller testified she had previously seen appellant consume a 12-pack of beer, and she believed his level of intoxication on the night of the accident was "much worse."

Robert Wyatt testified that shortly before 8:30 p.m. on January 9, 2006, he was having dinner at Van Stone's house when appellant arrived. Appellant was loud and appeared to be "heavily intoxicated" and had a strong alcohol smell on his breath. He thought appellant's balance and coordination were "mostly good." Appellant explained that he had wrecked his truck. Wyatt contacted CHP the following morning.

CHP Sergeant Robert Mota testified he went to appellant's house at approximately 3:30 p.m. on January 10, 2006. When Mota went inside, he saw appellant hiding behind the bed in the master bedroom. Mota spoke with appellant and recorded the conversation. The CD of the conversation was played for the jury.

Gregory Priebe, a senior criminalist with the California Department of Justice Crime Lab in Santa Rosa, testified he analyzed a sample of appellant's blood on January 13, 2006, which was negative for alcohol. He stated that the body breaks down alcohol at a rate of 0.18 percent per hour and that there would be no alcohol present after 21 hours unless the beginning level was above .37 percent. He also testified to the effects of alcohol on brain function, stating that alcohol affects mental abilities, including the ability to process information, at even low concentrations. He testified that alcohol also impairs motor function and gives the user a "false sense of increased confidence in [his] abilities." Priebe opined that everyone is impaired to drive a vehicle with a .08 percent blood alcohol level and most people are impaired at a .05 percent level.

Edward Lewis, a member of the CHP's Multidisciplinary Accident Investigation Team (MAIT), testified that he inspected the mechanical workings of the two vehicles that were involved in the collision. He found no fault with the Suburban's acceleration system. The brake system was fully functional and other than collision damage, the steering system was fully functional. Lewis found no mechanical defects unrelated to collision damage. Lewis also did not find any failures in the any of the mechanical systems of the Ford.

Sergeant John Blencowe of the CHP testified he was assigned as an investigator for MAIT and conducted an accident reconstruction. His reconstruction showed the Ford went down an embankment and back up before rolling an undetermined number of times and landing on its tires. The Suburban appeared to have struck the Ford from the rear left, sending it out of control. Blencowe did a lamp analysis and concluded that the Ford's lights had been on at the time of the accident. As part of the analysis, he spoke with witness Peirsol who reported that the Ford's tail lamps had been illuminated. Blencowe further testified that the lap and shoulder restrains on the Ford were designed to be used together. The restraint analysis indicated that the shoulder harness failed, but it was unknown whether it had been engaged prior to the accident. Blencowe said it was possible that the harness came off during the accident. He opined that the cause of the collision was unsafe speed and "improper lane position" of the Suburban, and that the driver of the Suburban was at fault.

Michael Jay Lutz testified that in 2000, he was a program specialist at the Drinking Driving Program (DDP), a state-mandated program for individuals who are convicted of driving under the influence. Lutz found three documents related to appellant's participation in the program during 2000. The first was a scheduling log dated Friday, May 12. According to the scheduling log, it appeared appellant signed up to participate in DDP on this date. The second was a scheduling log dated September 14, which indicated that appellant had an appointment for an "exit," which is an event that occurs after participants complete a 15-week program, pay their fees and have their files

verified. The third was a "copy of proof of completions" showing that participants cannot complete the program without attending 15 sessions.

Mary Crivellone testified that from May to August 2000, she worked as an instructor and group facilitator for DDP. The program consisted of 15 two-hour sessions that included one session with speakers from Alcoholics Anonymous and 14 other sessions that covered the topics of drinking and driving safety, medical aspects of addiction, addiction in the family, the process of addiction, and "[h]ow you are going to take the knowledge you [gain] and apply it to your life." An attendance roster indicated that appellant's classes took place on Thursday evenings from May through August 2000. Crivellone testified that when she taught this course during that time, she showed videos illustrating the potentially fatal consequences of drinking and driving and discussed these potential consequences in class. Crivellone discussed with the attendees that if they killed someone while driving under the influence, the likelihood of them being charged with vehicular manslaughter was high. Crivellone could not definitively say whether appellant was in her class. A copy of appellant's certified notice of certificate of completion of DDP was admitted into evidence.

Forensic pathologist Kelly Arthur testified she conducted a postmortem examination of the victim on January 11, 2006. Arthur reviewed a photograph and confirmed it accurately depicted the way the victim's body appeared before Arthur conducted an external examination of the body, including its clothing and hair. The photograph was admitted into evidence. Arthur testified that the examination revealed the victim died as a result of traumatic compressional asphyxia, which means "she died literally of being crushed [by the vehicle] so that she couldn't breathe . . . ." On examination by defense counsel, Arthur acknowledged she had made a mistake in October 2006 when she conducted an autopsy on the wrong body in another case.

The parties stipulated that appellant was convicted of driving with a prohibited level of alcohol in his blood on April 2, 1987, February 5, 1988, March 11, 1990, and December 7, 1990, and was convicted of attempted driving under the influence of an alcoholic beverage on April 6, 1992.

A jury found appellant guilty as charged and found true the allegations regarding appellant's prior convictions. The trial court found true the allegation that appellant had been convicted of a prior strike. Appellant moved for a new trial and also moved to have his prior strike stricken. The trial court denied both requests, and sentenced appellant to a term of 43 years to life.

DISCUSSION

The trial court did not err in admitting photographs of the decedent into evidence.

Appellant contends the trial court abused its discretion in admitting two photographs into evidence–one of the victim lying next to her car at the scene of the accident and another showing her at the pathology laboratory prior to the autopsy. He argues the photographs were irrelevant and "gruesome." We reject the contention.

When reviewing a trial court's decision to admit photographs of a decedent, the appellate court considers "(1) whether the challenged evidence satisfied the 'relevancy' requirement set forth in Evidence Code section 210, and (2) if the evidence was relevant, whether the trial court abused its discretion under Evidence Code section 352 in finding that the probative value of the photograph was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice." (*People v. Scheid* (1997) 16 Cal.4th 1, 13 (*Scheid*).) "Relevant evidence is defined in Evidence Code section 210 as evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' The test of relevance is whether the evidence tends ' "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence [citations]." (*Id.* at pp. 13-14.) The admission of photographs of a victim also "lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs is clearly outweighed by their prejudicial effect. [Citations.]' [Citation.]" (*Id.* at p. 18.)

In *Scheid*, the defendant contended that a 10 inch by 8 inch color photograph of the husband and wife victims "handcuffed together" with "[t]heir heads . . . resting on the blood-soaked box spring of their bed, their bodies sprawled on the floor" and their shirts soaked with blood, (16 Cal.4th at pp. 8-9) was improperly admitted into evidence because the husband, who survived the shooting, testified to the events that led to the scene depicted in the photograph, and because the victims' son testified "to the grisly sight he encountered upon discovering his parents several hours after they were shot." (*Id.* at p. 14.) The defendant also asserted that "because the prosecution tried the case on a felony-murder theory that sought to establish [the] defendant's culpability for the murder of [the wife] based upon her having facilitated the underlying robbery (and not upon any involvement in the actual shootings), the gory scene depicted in the photograph had no place in her trial, since malice is not a contested issue in a felony-murder prosecution." (*Ibid.*) Finally, the defendant argued that even if the photograph constituted relevant evidence, it was improperly admitted because it was "gruesome and likely to inflame the passions of the jury." (*Id.* at p. 18.)

The Supreme Court rejected the defendant's claims, noting that the defense's concept of relevancy was "inappropriately narrow." (*Scheid, supra,* 16 Cal.4th at p. 14.) The Court noted the photograph was relevant for three reasons. First, it corroborated the testimony of the witnesses. (*Id.* at p. 15.) Second, it established that a murder occurred. (*Ibid.*) Third, it depicted the victims handcuffed, which showed the killing was not spontaneous. (*Id.* at pp. 15-16) The Court rejected the defendant's claim that these facts could be established through other evidence, stating, "it is immaterial for purposes of determining the relevance of evidence that other evidence may establish the same point." (*Id.* at p. 16.) The Court also found immaterial that the defense offered to stipulate that a murder had occurred, stating, " 'The prosecutor " 'was not obliged to prove these details solely from the testimony of live witnesses' [citation] or to accept antiseptic stipulations in lieu of photographic evidence. '[T]he jury was entitled to see how the physical details of the scene and the bod[ies] supported the prosecution theory . . . .' " [Citation.]' [Citations.]" (*Ibid.*) Finally, the Court held the photograph was "not unduly gory or

inflammatory," and the trial court could reasonably determine that the probative value of it outweighed its potentially prejudicial effect. (*Id*. at pp. 19, 20.)

Similarly, here, appellant was charged with murder and the prosecution had the burden of establishing that the victim was killed as a result of appellant's actions. The photograph of the victim lying next to her car was relevant to show she died at the scene of the accident. Appellant asserts the photograph was not an "accurate rendition of the accident scene and could not conceivably have had any probative value" because it depicted the victim after she had been moved from underneath her car. Although the photograph did not depict the scene as it appeared immediately after the accident, it corroborated the testimony of Zwetsloot, who described what he observed when he arrived shortly thereafter. The photograph of the victim's body at the pathology laboratory was relevant to show the body was autopsied to determine the cause of death, and also corroborated the testimony of forensic pathologist Arthur who testified she conducted an autopsy of the victim's body. Both photographs were relevant to show the autopsy was conducted on the correct body. Although appellant asserts the photographs were irrelevant because he did not "challenge[] in any way" the contentions that the victim died at the scene of the accident or that her body was later autopsied at the hospital, the record shows the defense did in fact suggest the autopsy could have been conducted on the wrong individual by emphasizing that Arthur had previously conducted an autopsy on the wrong body. Moreover, the fact that the defense does not dispute or is willing to stipulate to certain facts is immaterial because, as noted, the prosecutor is " ' " 'not obliged to prove these details solely from the testimony of live witnesses' [citation] or to accept antiseptic stipulations in lieu of photographic evidence." ' " (See *Scheid, supra*, 16 Cal.4th at p. 16.)

Appellant contends that the prosecutor's argument to the jury in closing that "cause of death is not an issue" shows the prosecution acknowledged the "pathology testimony was essentially irrelevant and that there was, therefore, no need to have the jury see the photographs of the decedent both at the scene of the accident and at the pathology laboratory." He also suggests that even if the prosecution truly needed the

photographs, it could have simply shown the witnesses the photographs without publishing them to the jury. A prosecutor's statements to the jury, however, are not evidence, and his argument that "cause of death is not an issue" was not an admission that the pathology testimony and photographs were irrelevant to the case. Further, the prosecution was entitled to show the photographs to the jury so that the jury could see for itself how the photographs supported the prosecution's case. (See *Scheid, supra,* 16 Cal.4th at p. 16 [the jury is entitled to see how photographs support the prosecution theory].)

Appellant further contends that even if the photographs were relevant, they were "gruesome" and evoked "sympathy for the victim, sorrow for the victim's family, and antagonism against the defendant for having reduced an innocent victim to a dead body on the side of the road." We have reviewed the photographs and conclude that although they are unpleasant, as some blood can be seen on the victim's face (in both photographs) and on the ground (in the first photograph), they are not unduly gruesome for a murder case in which the victim was pinned under her car. The first photograph shows the victim lying next to her car. The second photograph shows the victim's fully clothed body on an autopsy table. The photograph was taken before Arthur conducted an external examination or began the autopsy process. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1258 [photographs were not considered unduly gruesome where the victims' bodies were not depicted "in a badly decomposed condition [citation] or after they had been grossly disfigured during autopsy"].) We do not believe that either photograph was likely to inflame the jury into reaching a decision it otherwise would not have reached. We also note that before admitting the two photographs, the trial court reviewed a total of eight photographs and excluded photographs that were "worse," more "inflammatory," or "more graphic." In light of the relevance and nature of the photographs that were admitted, the trial court could have reasonably determined that the probative value of the two photographs outweighed their potentially prejudicial effect. We therefore conclude the trial court did not abuse its discretion in admitting those photographs into evidence.

The trial court did not err in admitting appellant's statements to Mota into evidence.

Appellant contends his statements to Mota were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and should therefore not have been admitted into evidence. We disagree.

Miranda provides "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (384 U.S. at p. 444.) Once properly advised of *Miranda* rights, a suspect may waive them provided the waiver is voluntarily, knowingly and intelligently made. (*Id*. at p. 479.) The prosecution has the burden of proving by a preponderance of the evidence that the defendant's waiver was knowing and voluntary. (*People v. Smithson* (2000) 79 Cal.App.4th 480, 498-499.)

"It is . . . settled . . . that a suspect who [wishes] to waive his *Miranda* rights and submit to interrogation by law enforcement authorities need not do so with any particular words or phrases." (*People v. Cruz* (2008) 44 Cal.4th 636, 667.) "We have recognized that a valid waiver of *Miranda* rights may be express or implied." (*Ibid*., citing *People v. Whitson* (1998) 17 Cal.4th 229, 246, and *People v. Cortes* (1999) 71 Cal.App.4th 62, 69; see also *North Carolina v. Butler* (1979) 441 U.S. 369, 373 ["waiver can be . . . inferred from the actions and words of the person interrogated"].) In California, when a defendant affirmatively states he understands his Miranda rights and then speaks with the police, he generally will be found to have waived his Miranda rights. (See *People v. Whitson* (1998) 17 Cal.4th 229, 249-250 [although officers did not obtain express waiver of Miranda rights, defendant's indication he understood his rights and subsequent response to questions showed knowing and intelligent agreement to speak with authorities]; *People v. Sully* (1991) 53 Cal.3d 1195, 1233 [defendant implicitly waived Miranda rights when, after being admonished of those rights, he responded affirmatively that he understood them and gave a tape-recorded statement to the detective].) "Although there is a threshold presumption against finding a waiver of *Miranda* rights (*North Carolina v. Butler*, *supra*, 441 U.S. at p. 373), ultimately the question becomes whether the *Miranda*

waiver was knowing and intelligent under the totality of the circumstances surrounding the interrogation." (*People v. Cruz*, *supra*, 44 Cal.4th at p. 668.)

"In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda* . . . , we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.] Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we ' "give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence.' [Citations.]" (*People v. Wash* (1993) 6 Cal.4th 215, 235-236.)

At a hearing to determine whether the statements appellant made to Mota should be admitted into evidence, Mota testified that he and three other officers entered appellant's house on January 10, 2006, and that at least one of the officers had his or her gun drawn. Mota pointed his gun at appellant and appellant was handcuffed. Before the interview, appellant's wife was "in audible range" of both Mota and appellant, and Mota could hear her crying. Mota smelled marijuana on appellant.

The transcript of the interview shows the following exchange took place before appellant made various statements to Mota:

"[Mota:] . . . Arnie, my name is Robert, an officer with the Highway Patrol, obviously. That's Scott. Let me just read this to you here because I, you're in handcuffs, obviously, I have to. You have the rights to remain silent. Anything you say may be used against you in a court of law. You have the right to talk with an attorney and have an attorney present before and during questioning. If you cannot afford an attorney, one will be appointed free of charge to represent you before and during questioning if you desire. Do you understand each of these rights I have explained to you?

"[Appellant:] Yeah.

"[Mota:] Okay, Arnie I'd like to talk to you about what happened and I'll tell you what's going on, what I know. Ammm, I'd like to give you this opportunity to get this off your chest of what happened last night. Ammm, obviously we went out there and it was your

vehicle that was involved, and ahhh, I'm just writing down the time here, I'm sorry. 1542 hours. Ammm, we had a couple of witnesses that gave us some descriptions. Ammm, do you want to tell us what happened?

"[Appellant:] I fe[ll] asleep at the wheel and when I went off the road, I got scared and ran home."

Appellant went on to say the accident occurred when he was on his way home after spending several hours at his friend Ron's house. Mota said he knew appellant had been drinking alcohol and that he went to Ron's house *after* the accident, and that he wanted appellant to be honest. The following exchange then took place:

"[Appellant:] You think I should contact my attorney? I don't know, I'm not sure, I don't know how this works.

"[Mota:] You know what? That's, I don't know what you want to do. That's up to you. Appellant: I, I, I want to get this over with. I want to continue my life.

"[Mota:] OK, I'm here, if you want to give me a statement, that's why I'm here. If you want to tell me your side of the story, that's why I'm here. I, I, I can't twist your arm and make you tell me your side of the story.

"[Appellant:] Right.

"[Mota:] Ammm, it's up to you. This is it, . . . we're not going to have another chance for you to talk to me.

"[Appellant:] Right.

"[Mota:] So, if you want to tell me the truth about what happened last night, this is it. I'd love to get your side of the story because I have other sides of the story, but I don't have yours.

"[Appellant:] Right. Well, I mean, I don't know what side, I passed out, or, fell asleep."

Appellant said he had "a couple of beers throughout the day" and fell asleep and "just ran, ran" when he "got so scared." He said a friend named Mike picked him up and took him to Ron's house.[3] Mota asked appellant how many DUI schools he has been to,

[3] Appellant later said he called his wife and that she picked him up.

to which appellant responded he had been to and completed two. He acknowledged he was told (at the schools) that drinking and driving is dangerous and that he could kill people if he drank and drove. Later, when told by Mota that a woman died as a result of the accident, appellant became emotional and started to cry.

Under the totality of the circumstances, we agree with the trial court's finding that appellant implicitly waived his *Miranda* rights during his interview with Mota. As the trial court found, Mota provided an adequate and explicit admonition regarding appellant's *Miranda* rights. Appellant expressly stated he understood those rights and proceeded to respond to Mota's questions in a competent manner. There is no evidence that appellant suffered from any mental disabilities and the record shows appellant has been through the criminal justice system on numerous prior occasions and was no stranger to the law. (See *North Carolina v. Butler*, *supra*, 441 U.S. at pp. 374-375 ["the question of waiver must be determined 'on the 'particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused' "].

Appellant contends that Mota's use of an "interrogation ploy" shows appellant's waiver was not voluntary. Specifically, he points out that Mota "intentionally decline[d]" to ask appellant whether he waived his *Miranda* rights and "jumped directly . . . to a discussion of why he wanted to talk to appellant," including saying it was an "opportunity" for appellant to "get this off [his] chest." Appellant also notes that at one point during the conversation, he "abruptly disavowed any desire to continue the conversation," which he argues supports his position that he did not waive his rights.

As noted, Mota was not required to obtain an express waiver from appellant. (See *People v. Cruz*, 44 Cal.4th at p. 667 [a valid waiver of *Miranda* rights may be express or implied].) We do not believe the statements Mota made to appellant before asking, "do you want to tell us what happened?" show that Mota coerced appellant into waiving his rights. Further, contrary to appellant's assertion that he "abruptly disavowed any desire to continue the conversation," there is nothing in the record indicating appellant wished to stop responding to Mota's questions. Although, at one point, appellant asked whether

he should contact his attorney and said "I don't know how this works," this did not show an unequivocal request for an attorney or a wish to discontinue talking to Mota. Moreover, Mota responded appropriately by stating that decision was "up to [appellant]" and that Mota could not "twist [his] arm" to make him say what happened. The exchange shows appellant understood his rights and voluntarily elected to waive those rights and continue talking so that he could "get this over with" and "continue with [his] life." We are satisfied that appellant was apprised of and understood his *Miranda* rights.

In any event, there was no prejudice. The only portion of the statement that appellant argues was prejudicial is his admission that he was told in his drunk driving schools that drinking and driving is dangerous and that he could kill people if he drinks and drives. He asserts "[t]he core of the evidence relied on by the prosecution to establish implied malice was contained in the interrogation." However, the prosecution independently established this fact with evidence that appellant had participated in DDP, which taught participants about the dangers and potentially lethal consequences of drinking and driving. The prosecution also introduced testimony of Velez, who advised appellant that he would kill someone if he drove home drunk, and Johnson, who testified she did not want him to drive drunk because her children could be on the road. The parties stipulated that appellant had five prior convictions related to drinking and driving and evidence was produced that on one of those prior occasions, appellant had ploughed through a group of planters and outdoor tables in front of a restaurant while driving under the influence, indicating he was aware of the possible dangers of drinking and driving. Because there was overwhelming evidence of appellant's knowledge of the dangerous and potentially lethal consequences of drinking and driving, the admission of appellant's statement, even if error, was harmless beyond a reasonable doubt.

The trial court did not err in not instructing the jury regarding voluntary intoxication and implied malice.

Appellant contends the trial court erred in refusing to instruct the jury with CALCRIM 580 (involuntary manslaughter), CALCRIM 625 (voluntary intoxication), CALCRIM 626 (voluntary intoxication causing unconsciousness) and CALCRIM 3426

(voluntary intoxication as to non-homicide offenses), which would have allowed the jury to consider evidence of appellant's voluntary intoxication "as an impediment to the formation of implied malice." We conclude there was no error.

A trial court must instruct the jury "on the law applicable to each particular case." (*People v. Wickersham* (1982) 32 Cal.3d 307, 323, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201.) "[E]ven in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) Therefore, a claim that a court failed to properly instruct on the applicable principles of law is reviewed de novo. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) In conducting this review, we first ascertain the relevant law and then "determine the meaning of the instructions in this regard." (*People v. Kelly* (1992) 1 Cal.4th 495, 525.)

The proper test for judging the adequacy of instructions is to decide whether the trial court "fully and fairly instructed on the applicable law [citation]." (*People v. Partlow* (1978) 84 Cal.App.3d 540, 558.) " 'In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole. We must also assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]' " (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.) "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation. [Citations.]" (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.)

Before 1996, evidence of voluntary intoxication was admissible to negate the subjective component of implied malice. At that time, section 22, subdivision (b), permitted evidence of voluntary intoxication "solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (Stats. 1982, ch. 893, § 2.) In *People v. Whitfield* (1994) 7 Cal.4th 437, 446 (*Whitfield*), the Supreme

Court held the reference to " 'malice aforethought, when a specific intent crime is charged,' " was broad enough to cover murder based on implied malice.

Responding to the holding in *Whitfield*, the Legislature amended section 22, subdivision (b) in 1995. (Sen. Bill No. 121 (1995-1996 Reg. Sess.) § 1.) The statute now provides in pertinent part, "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." Thus, evidence of voluntary intoxication is no longer admissible to determine whether a defendant harbored the requisite mental state for implied malice. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1117 (*Martin*); *People v. Mendoza* (1998) 18 Cal.4th 1114, 1125; *People v. Reyes* (1997) 52 Cal.App.4th 975, 984, fn. 6.)

Appellant acknowledges that section 22 and case law have upheld the general proposition that voluntary intoxication is not a defense to implied malice murder. He also does not dispute that the legislature, as a general rule, may preclude the use of intoxication as a defense to negate implied malice without offending due process. He asserts however, that such a rule is unconstitutional when the prosecution is allowed to use evidence of intoxication to *establish* implied malice, while the defense is precluded from having the jury consider whether his intoxication *negated* implied malice. In other words, he contends that the asymmetry of allowing intoxication to be used inculpatorily but not exculpatorily violated his rights to due process and a fair trial.

Martin and *Montana v. Egelhoff* (1996) 518 U.S. 37 (*Montana*), resolve this issue against appellant. In *Martin*, the court focused on the opinion in *Montana*, in which the United States Supreme Court found that "a defendant's right to have a jury consider evidence of his voluntary intoxication in determining whether he possessed the requisite mental state was not a 'fundamental principle of justice.' As a result, the court held that Montana's statutory ban on consideration of a defendant's intoxicated condition in determining the existence of a mental state, which is an element of the offense, did not violate the due process clause. [Citations.]" (*Martin*, *supra*, 78 Cal.App.4th at p. 1115.)

Martin also noted the "well-settled principle" reiterated in *Montana* "that 'the introduction of relevant evidence can be limited by the State for a "valid" reason . . . .' [Citation.] As long ago as 1969, the California Supreme Court recognized the commonly held public belief that 'a person who voluntarily gets drunk and while in that state commits a crime should not escape the consequences.' [Citation.] The 1982 and 1995 amendments to section 22 are a reflection of this public perception." (*Martin, supra,* 78 Cal.App.4th at p. 1116.) The court added: "Several courts have addressed the constitutional validity of the legislative enactments abolishing the defense of diminished capacity . . . and found no due process violation." (*Ibid*.)

In her concurring opinion in *Montana*, Justice Ginsburg explained that "[d]efining *mens rea* to eliminate the *exculpatory value of voluntary intoxication* does not offend a 'fundamental principle of justice,' . . . .' "[4] (*Montana*, *supra*, 518 U.S. at pp. 58-59 (con. opn. of Ginsburg, J.), second italics added; accord *id.* at p. 50, fn. 4 (plur. opn. of Scalia, J.) [endorsing legal analysis of Justice Ginsburg's concurring opinion].) Justice Ginsburg also quoted approvingly the statement by Justice Souter in dissent that "a State may so define the mental element of an offense that evidence of a defendant's voluntary intoxication at the time of commission does not have *exculpatory relevance* and, to that extent, may be excluded without raising any issue of due process." (*Id.* at p. 59 (conc. opn. of Ginsburg, J.), italics added, quoting *id.* at p. 73 (dis. opn. of Souter, J.).)

Appellant's due process claim is predicated on his complaint that the prosecution was allowed to make use of the *inculpatory* value of intoxication evidence, while he was precluded from making use of the *exculpatory* value of such evidence to negate implied malice. However, *Montana* recognized and endorsed the asymmetric limitation on the use of intoxication evidence by concluding, as noted, that the legislature may eliminate

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[4] Justice Ginsberg's concurring opinion "may be viewed as the holding of the Court." (*People v. Timms* (2007) 151 Cal.App.4th 1292, 1299.) " ' "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . .' " ' [Citation.]" (*Ibid*.)

the "exculpatory" value of such evidence, rendering it available and useful to the prosecution but not to the defense, without "offend[ing] a 'fundamental principle of justice' . . . ." (518 U.S. at p. 59 (conc. opn. of Ginsburg, J.).) Although appellant has couched his argument as a matter of asymmetry, his contention is nevertheless the equivalent to that which was addressed and rejected in *Montana*.

Appellant cites to three cases in support of his position that the asymmetry presented here violates due process. These cases are distinguishable. *Simmons v. South Carolina* (1994) 512 U.S. 154 (*Simmons*), and *Kelly v. South Carolina* (2002) 534 U.S. 246, involved unique capital sentencing principles in which the defense was barred from informing the capital sentencing jury that the defendant would receive life imprisonment without parole as the alternative to death, notwithstanding the prosecution's argument that the defendant posed a future danger to the public if not executed. (*Simmons*, *supra*, 512 U.S. at pp. 156-161 [plur. opn. of Blackmun, J.).) In reversing the death sentence, the Court did not rely on a generalized notion that due process forbids asymmetry in proving the elements of a crime. Rather, the Court explained its decision was based on the capital sentencing principle that "[t]he Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.' [Citation.]" (*Id.* at p. 161 (plur. opn. of Blackmun, J.).) Moreover, we note that the prosecutor's statement that a defendant poses a future danger to the public *unless* he is executed is a false statement because the defendant will also pose no future danger to the public if he is *not* executed and is sentenced to life in prison without the possibility of parole. In contrast, here, the prosecution, in using evidence of voluntary intoxication to prove implied malice, is not being untruthful or making false statements to the jury.

The third case on which appellant relies, *People v. Varona* (1983) 143 Cal.App.3d 566 (*Varona*), is likewise inapposite. There, the defendants were charged with sexually assaulting the victim. (*Id.* at p. 568.) The defendants claimed the victim was a prostitute who solicited the sexual encounter and consented to it. (*Ibid*.) The prosecutor successfully sought exclusion of evidence that the victim had previously pled guilty to prostitution but argued in closing that there was no evidence that the victim was a

prostitute. (*Ibid*.) The Court of Appeal did not invoke the due process clause to cure any impermissible asymmetry. Instead, it found the trial court should have admitted the evidence and that the prosecutor committed misconduct by arguing to the jury a fact it knew to be false. (*Id.* at p. 570.) *Simmons*, *Kelly*, and *Varona* do not support appellant's position that the trial court violated his rights to due process and a fair trial.

DISPOSITION

The judgment is affirmed.

_____
McGuiness, P.J.

We concur:

_____
Pollak, J.

_____
Jenkins, J.